

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TINYBUILD LLC, a Washington limited
liability company,

Plaintiff,

v.

NIVAL INTERNATIONAL LIMITED, a
Cypriot corporation,

Defendant.

NO. 2:19-cv-00805-TSZ

PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION TO STRIKE
AND CROSS MOTION TO EXTEND
DEADLINE

NOTED ON MOTION CALENDAR:
FRIDAY, OCTOBER 25, 2019

Plaintiff tinyBuild LLC ("tinyBuild"), by and through its undersigned counsel, hereby presents this Opposition to Defendant Nival International Limited's ("Nival") Motion to Strike tinyBuild's Opposition to Protective Order and Cross Motion to Extend Deadline. Due to an inadvertent miscalculation, tinyBuild filed its Opposition to Nival's Motion for Protective Order a day late. Defendant's motion seeks to strike tinyBuild's opposition as untimely. tinyBuild opposes that motion and, pursuant to Federal Rule of Civil Procedure 6(b)(1)(b), respectfully requests that this Court, in its discretion, enter an order *nunc pro tunc*, that extends the deadline for tinyBuild's opposition by one day so that its opposition can be received and considered by the Court.

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO
STRIKE AND CROSS MOTION TO EXTEND DEADLINE - 1

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I. FACTS

The procedural facts relevant to this motion are as follows: On September 27, 2018, Nival filed a Motion for Protective Order, which was noted for consideration on October 11, 2019. *See* Declaration of Diana S. Breau, ¶ 2. Due to inadvertent error in calculating the deadline for tinyBuild’s response, counsel for tinyBuild incorrectly believed that the filing deadline was Thursday, October 10, and filed the opposition on that date. In fact, as Nival notes in its Motion to Strike, the deadline was Wednesday, October 9. *See id.* at ¶ 3.

On October 15, 2019, four days after the noting date of its motion for protective order, and five days after tinyBuild’s admittedly tardy opposition, Nival filed its Motion to Strike Opposition to Protective Order on October 15, 2019, citing tinyBuild’s untimely filing and the insufficient time for Nival to submit a reply before the noted date. In its Motion to Strike, Nival also replied to tinyBuild’s Opposition. *Id.*, at ¶4.

II. ARGUMENT

tinyBuild’s twenty-four hour delay in filing its response to Nival’s Motion for Protective Order is the result of an excusable miscalculation, warranting extension. Federal Rules of Civil Procedure Rule 6(b) allows for the extension of time by the Court for good cause. Fed. R. Civ. P. 6(b)(1). After the time for filing has expired, the Court may extend time due to excusable neglect. Fed. R. Civ. P. 6(b)(1)(B); *see also In re Sheehan*, 253 F.3d 507 (9th Cir. 2001). Four factors are relevant to determine excusable neglect: (1) danger of prejudice to the nonmoving party, (2) the length of delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the moving party, and (4) whether the moving party acted in good faith. *In re Sheehan*, 253 F.3d at 514. Courts have used a flexible approach in analyzing good cause based on excusable neglect. *See Pryor v. Aerotek Scientific, LLC*, 278 F.R.D. 516 (C.D. Cal. 2011) (“...it is clear that ‘excusable neglect’ under Rule 6(b) is a somewhat ‘elastic concept’ and is not limited strictly to omissions caused by circumstances beyond the control of the movant.”), citing *Pioneer*

1 *Investment Services Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380, 392, 113 S.Ct.
2 1489 (1993)).

3 With this opposition and cross motion, tinyBuild respectfully requests a twenty-four
4 hour extension of time to respond to Nival's motion, *nunc pro tunc*, as tinyBuild satisfies all
5 four factors demonstrating excusable neglect warranting an extension. The only prejudice that
6 Nival cited in its Motion to Strike was insufficient time to respond prior to the noting date,
7 which is now cured by Nival's instant motion, which included substantive argument in reply to
8 tinyBuild's opposition. tinyBuild does not object to this filing, and if accepted as a reply brief,
9 tinyBuild's twenty-four hour delay has not prejudiced Nival. Nival was still able to submit a
10 fully formed reply on October 15, 2019, two business days after the date noted for
11 consideration and three business days after tinyBuild filed its response. Because the delay was
12 of a short duration – merely twenty-four hours – and Nival has now been allotted sufficient
13 time to reply, the first two factors favor tinyBuild.

14 Here, the untimely filing resulted from an internal office error in assessing the deadline
15 of tinyBuild's response to Nival's motion. As recognized in *Pryor*, courts have taken a rather
16 elastic view of mistakes constituting excusable neglect including even circumstances within the
17 moving party's control. Neglect "encompasses simple, faultless omissions to act and, more
18 commonly, omissions caused by carelessness." *See Pryor*, 278 F.R.D. at 522 (quoting *Pioneer*
19 *Investment Services*, 507 U.S. at 388). In contrast to intentional or culpable acts and omissions
20 that are done willfully or deliberately in bad faith, neglectful behavior is done in good faith free
21 of any intention to take advantage of the opposing party or manipulate the legal process. *See*,
22 *id.* That is exactly what has happened here. Counsel made an honest mistake. This was a mere
23 omission due to a rare internal oversight, not intent to detriment Nival.

24 Lastly, tinyBuild has acted, and continues to act, in good faith to address Nival's
25 Motion for a Protective Order. tinyBuild's short delay in filing its response was not done to
26 prejudice Nival or for some devious motive; instead, it was a simple inadvertence. tinyBuild

1 also has no issue with allowing Nival's reply three business days from tinyBuild's date of
 2 filing. Nor does tinyBuild object to a supplemental reply brief by Nival, if there is anything
 3 more to be said on the application. tinyBuild has therefore acted in good faith and has not
 4 created any prejudice on Nival.

5 Nival has had ample opportunity to reply to tinyBuild's Opposition to its Motion for
 6 Protective Order. Further, all relevant factors favor granting tinyBuild's request for a twenty-
 7 four hour extension of the deadline for it to oppose such motion, *nunc pro tunc*.

8 III. CONCLUSION

9 For the reasons stated above, tinyBuild respectfully requests that this Court deny
 10 Nival's Motion to Strike, grant tinyBuild a one-day extension of time to oppose Nival's Motion
 11 for Protective Order, and accept its opposition filed on October 10, 2019.

12 DATED this 15th day of October, 2019.

13 FOSTER GARVEY PC

14 By s/Diana S. Breaux

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21 Attorneys for Plaintiff tinyBuild LLC

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties who have appeared in this matter.

s/Bonnie Rakes

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